Supreme Court, U.S.
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No. 05-____
(CAPITAL CASE)

**IN THE SUPREME COURT OF THE UNITED STATES**

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**STATE OF FLORIDA,**
*Petitioner,*

v.

**ANDREW DARRYL BUSBY,**
*Respondent.*

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On Petition for Writ of Certiorari to the
Supreme Court of Florida

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# PETITION FOR WRIT OF CERTIORARI

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CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General

CASSANDRA K. DOLGIN
Assistant Attorney General
*Counsel of Record*

OFFICE OF THE ATTORNEY GENERAL
The Capital
Tallahassee, FL 32399-1050
(850) 414-3579
(850) 487-0997 (fax)

CAPITAL CASE

## QUESTIONS PRESENTED

I. Whether the federal constitutional right to an impartial jury requires automatic reversal of a conviction, irrespective of the lack of bias of the seated jury, when the defendant uses one of his peremptory challenges to remove a venireman who should have been struck upon the defense's motion to remove for cause and seeks but is denied an additional peremptory challenge to remove a specific juror?

II. Whether the equal protection prohibition against the exercise of discriminatory peremptory challenges is violated by Florida's per se reversible error rule in conjunction with a denial of an additional peremptory challenge to replace that used to remove a venireman improperly retained upon a motion to strike for cause?

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On Petition for Writ of Certiorari to the
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Petitioner, State of Florida, prays the Court for its order granting a writ of certiorari to review the judgment of the court below reversing respondent Busby's judgment of conviction.

## OPINION BELOW

The February 3, 2005 Revised Opinion of the Florida Supreme Court, upon which petitioner seeks this Court's review, is reported at 2004 Fla. LEXIS 1925 (Fla. 2004), and published in the Appendix (hereinafter "App.") at pp. A-1-44.

## JURISDICTIONAL STATEMENT

The Revised Opinion of the Supreme Court of Florida was issued on February 3, 2005. App. A-1-44. The court below denied the State's timely petition for rehearing on that same date. App. A-

45. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides, in pertinent part, that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

Respondent, Andrew Darryl Busby, was charged by indictment in the Circuit Court of Columbia County, Florida, on August 17, 2000, with the first-degree murder of Elton Ard. (R. 1:1.)[1] Ard, a fellow inmate of the Florida Department of Corrections also housed at the Columbia Correctional Institution, id., was murdered on July 3, 2000. Id. The jury found Busby guilty as charged on March 15, 2002. (R. 17:3360). The case then proceeded to the penalty-phase, (R. 82:1547), where the jury subsequently recommended that Busby be sentenced to death. (R. 84:1864). The trial court sentenced respondent accordingly. (R: 86:1915). A co-defendant, Charles Globe, was also indicted for the murder and convicted in a separate trial. (R. 1:1). Globe received a death sentence upon a jury's recommendation as well, which the Florida Supreme Court affirmed on March 18, 2004. Globe v. State, 877 So. 2d 663 (Fla. 2004).

The facts relevant to the issues herein raised are as follows:

At trial, respondent raised a challenge for cause against venireman Kim Lapan, which the trial court rejected. (R. 72:390; R:73:601). Busby ultimately exercised his remaining peremptory challenge to remove Mr. Lapan. (R. 73:602; R:74:607), and later sought two additional peremptory challenges, stating that he would remove veniremen Winston and Liebel with the extra challenges. (R. 75:744-745, 827). The trial court rejected respondent's request. (R. 75:745).

Following his conviction and sentencing, respondent appealed to the Supreme Court of Florida. There, Busby raised thirteen grounds for relief; relevant to this petition is his first claim: "The court erred in refusing to grant Busby's cause challenges to

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[1] Reference is made to the trial court record, specifically the state trial court clerk's record on appeal, with the appropriate volume number and page citation, designated "R. V:P."

prospective juror Kim Lapan, a former guard of death row prisoners and one who had a bias against them, which forced him to use a peremptory challenge to keep him off his jury, a violation of his Fifth, Sixth, and Fourteenth Amendment rights." Initial Brief Of Appellant, at 19. Busby argued that as a result of the trial court's error "compelling" him to exercise one of his peremptory challenges, he was denied his federal constitutional right to an impartial jury. Id. at 27. Busby reiterated that argument in his reply brief:

> The issue presented here is quite simple: Did the court correctly deny Busby's cause challenge for prospective juror Lapan. If not, and if he preserved the issue, as required by Trotter v. State, 576 So. 2d 691 (Fla. 1990), reversal is automatic because *he did not have the impartial jury guaranteed by the Sixth Amendment.* Id. at 693; Gootee v. Clevinger, 778 So. 2d 1005 (Fla. 5th DCA 2000).

Reply Brief Of Appellant, at 2 (emphasis added).

Before the Florida Supreme Court, the State responded that venireman Lapan was qualified to serve on the jury and that the trial court properly denied the motion to strike for cause. App A-170 & n.4. The State further argued that Winston and Liebel, who respondent would have removed had he been granted additional peremptory challenges, were also qualified to serve and the jury was not biased.[2] App A-172-173. For purposes of this petition

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[2] Juror Liebel was subsequently removed after the jury was empaneled, for reasons other than bias. App. A-13. In any event, though her son worked at Columbia Correctional Institution, Ms. Liebel stated that she would only consider aggravating evidence that the court instructed upon and that she could vote for life if the aggravating circumstances were insufficient or if the mitigation outweighed the evidence in aggravation. (R. 72:393, 394). Ms. Liebel also stated that she could follow the court's instructions. In respect to Mr. Winston, he also stated that he could follow the court's instructions and

only, the State assumes without conceding that venireman Lapan, who respondent ultimately chose to exercise a peremptory challenge after denial of his request that he be struck for cause, should have been removed upon that motion. Nonetheless, respondent made no effort to present any evidence that the jury that sat was biased, and at no time moved to strike Mr. Winston (who did sit on the jury) for cause. (R. 72:397, 480).

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could vote for life if the aggravating circumstances were insufficient (R. 73:475) or if the mitigating circumstances outweighed the aggravators. (R. 73:475-476). This was despite the fact that his son worked at another state correctional facility. (R. 73:479).

## REASONS FOR GRANTING THE WRIT

### I.

**THE FLORIDA SUPREME COURT'S DETERMINATION -- THAT THE TRIAL COURT'S FAILURE TO REMOVE A VENIREMAN SUBJECT TO A STRIKE FOR CAUSE AND DEFENDANT'S "LOSS" OF A PEREMPTORY CHALLENGE USED TO REMOVE THAT VENIREMAN VIOLATED HIS RIGHT TO AN IMPARTIAL JURY -- IS INCONSISTENT WITH THIS COURT'S DECISIONS IN ROSS v. OKLAHOMA, 487 U.S. 81 (1988) AND UNITED STATES v. MARTINEZ-SALAZAR, 528 U.S. 304 (2000), THE COURT'S HARMLESS ERROR JURISPRUDENCE, AND CONFLICTS WITH DECISIONS OF OTHER STATE SUPREME COURTS AND UNITED STATES COURTS OF APPEALS.**

In reversing his judgment of conviction, the Florida Supreme Court held that respondent's constitutional right to an impartial jury was violated upon the trial court's failure to grant an additional peremptory challenge where a motion to strike a venireman for cause was erroneously denied, respondent used his allotment of peremptories, and identified another venireman that he would remove upon receipt of an additional peremptory challenge.[3]

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[3] This Court has jurisdiction under 28 U.S.C. § 1257(a). The Sixth Amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." Article I, §16(a) of the Florida Constitution similarly provides in pertinent part that "the accused . . . shall have the right . . . to have a speedy and public trial by impartial jury in the county where the crime was committed." In addressing the right to an impartial jury, the Florida Supreme Court has included citation to both constitutional provisions -- without differentiation between the two. See, e.g., Marshall v. State, 854 So. 2d 1235, 1241 n.7 (Fla. 2003); Foster v. State, 778 So. 2d 906, 912 (Fla. 2000); Rolling v. State, 695 So. 2d 278, 284 (Fla. 1997); Powell v. Allstate

Ins. Co., 652 So. 2d 354, 358 (Fla. 1995); State v. Alen, 616 So. 2d 452, 453 (Fla. 1993); Brown v. State, 538 So. 2d 833, 834-835 (Fla. 1989); Manning v. State, 378 So. 2d 274, 277 (Fla. 1979). And in State v. Neil, 457 So. 2d 481 (Fla. 1984), the Florida Supreme Court described the constitutional right at issue and its furtherance in the same manner as subsequently described by this Court in Ross v. Oklahoma, 487 U.S. 81, 85, 88 (1988): "Article I, section 16 of the Florida Constitution guarantees the right to an impartial jury. The right to peremptory challenges is not of constitutional dimension. The primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury." Neil, 457 So. 2d at 486.

The majority in Busby sometimes referred to the right as to "an impartial jury" and then at times cited to the Florida Constitution that provides that right. See, e.g., App. A-13, 14 n.8, 16, 17, 22, 23, 23, 24, 27. Busby raised the issue as a violation of his "Fifth, Sixth, and Fourteenth Amendment rights." App. A-47, 73; see also App. A-223, 231, 233. In ruling on the impartial jury claim, the Florida Supreme Court addressed decisions of this Court. App. A-20, 21, 23, 24, 25. And significantly, the majority opinion cited Justice Souter's concurrence in United States v. Martinez-Salazar, 528 U.S. 304 (2000), for the proposition that neither that opinion nor Ross compelled a different result. Specifically, the Florida Supreme Court distinguished those decisions upon its conclusion that this Court has not previously decided the constitutional issue as presented in Busby, where a defendant did all that state law required to preserve the impartial jury claim and was denied a request for an additional peremptory challenge to remove an identified venireman. See App. A-21 n.13 (quoting Martinez-Salazar, 528 U.S. at 317-18 (Souter, J., concurring)).

Accordingly, because (1) the right to an impartial jury under the state constitution is interpreted *in pari materia* with the United States Constitution, (2) respondent raised the claim under federal law, and (3) the Florida Supreme Court considered the issue in light of decisions from this Court, its isolated references to the state constitution does not constitute "an independent and adequate state ground for the decision" and thus does not insulate the Florida court's decision from this Court's review. Ohio v. Reiner, 532 U.S. 17, 20 (2001) ("In discussing the contours of that privilege [against self-incrimination under the Fifth Amendment], the court relied on our precedents. We have observed that this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law. . . . The decision at issue fairly appears . . . to be interwoven with federal law, and no adequate and independent state ground is clear from the face of

Both the majority and dissent readily identify the split of authority on the issue. App. A-25-26, 35, respectively. Pursuant to United States Supreme Court Rule 10(b), the grant of certiorari is warranted to clarify whether a violation of state law, relied upon to establish a federal constitutional error and interpreted to require automatic reversal, actually does establish a Sixth Amendment violation.

### *A. Use of a peremptory challenge to correct a trial court's erroneous denial of a motion to strike a venireman for cause does not violate the Sixth Amendment of the United States Constitution.*

Assuming that the trial court should have struck Mr. Lapan for cause upon Busby's motion, respondent's use of a peremptory challenge to correct that error, and as required under state law to preserve that error, his request for an additional peremptory upon extinguishing those provided pursuant to statute, identification of another venireman upon whom he would have exercised it if so granted, and the denial thereof, does not give rise to a Sixth Amendment violation of respondent's right to an impartial jury.[4]

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the opinion.") (internal quotation marks and citations omitted); Michigan v. Long, 463 U.S. 1032, 1043 (1983) (rejecting contention that state decision rested upon an independent state ground notwithstanding two citations to state constitution, where court relied exclusively upon federal cases in construing Fourth Amendment); see also Pennsylvania v. Muniz, 496 U.S. 582, 588 n.4 (1990); Maryland v. Garrison, 480 U.S. 79, 83-84 (1987).

[4] Interestingly, prior to the Florida Supreme Court's decision in Busby, that court addressed the constitutional right to an impartial jury as a distinct claim and basis for relief from the statutory right to peremptory challenges accorded under state law, specifically Fla. Stat. § 913.08. In Trotter v. State, 576 So. 2d 691 (Fla. 1990), the state high court, first applying federal law -- the issue presented here -- held pursuant to Ross that the defendant made no showing that a biased juror was seated. Trotter, 576 So. 2d at 692-693. On the other hand, in respect to the state statutory right to a designated number of peremptory challenges provided to both the state and defendant dependent

In Ross v. Oklahoma, 487 U.S. 81 (1988), this Court held in part that the right of a defendant to an impartial jury under the Sixth Amendment is not violated when he chooses to exercise a peremptory challenge to remove a venireman that the trial court should have struck for cause. Id. at 88; see also Stroud v. United States, 251 U.S. 380, 381 (1920) (memorandum opinion); Spies v. Illinois, 123 U.S. 131, 168 (1887). The basis for this Court's decision is that peremptory challenges are a creature of statutory law and are not constitutionally required, instead serving as "a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." Ross, 487 U.S. at 88. Accordingly, in considering whether a defendant's right to an impartial jury was violated, the focus is upon the jurors who actually sat at trial. Id. at 86.

Two years later, in United States v. Martinez-Salazar, 528 U.S. 304 (1990), the Court reaffirmed its Sixth Amendment analysis, in the context of a federal trial, rejecting the claim that a "'loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury.'" Id. at 313 (quoting Ross, 487 U.S. at 88).

Addressing the constitutional guarantee of an impartial jury, in accord with Ross and Martinez-Salazar, the majority of jurisdictions presented with the Sixth Amendment claim have rejected the proposition that the right includes entitlement to a jury of a particular composition. See, e.g., Klahn v. State, 96 P.3d 472, 483 (Wyo. 2004); People v. Yeoman, 72 P.3d 1166 (Cal. 2003), cert. denied, 541 U.S. 991 (2004); Ex parte Dailey, 828 So. 2d 340,

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upon the potential punishment under the crime charged, the Florida Supreme Court set forth the requisite standard for establishing a violation of the statute. Trotter, 576 So. 2d at 693. Compliance with the statutory right to peremptory challenges as a ground for relief in itself was not before the Florida Supreme Court. See supra, at 3-4.

343 (Ala. 2001); State v. Verhoef, 627 N.W.2d 437, 441 (S.D. 2001); State v. Fire, 34 P.3d 1218, 1222, 1224 (Wash. 2001); Bangs v. State, 998 S.W.2d 738, 744-45 (Ark. 1999); Dye v. State, 717 N.E.2d 5, 18 n.13 (Ind. 1999); State v. Nicklasson, 967 S.W.2d 596, 612 (Mo. 1998); State v. Barone, 969 P.2d 1013, 1018-1019 (Ore. 1998); Minch v. State, 934 P.2d 764, 769-770 (Alaska Ct. App. 1997); Grandison v. State, 670 A.2d 398, 417-418 (Md. 1995); State v. Phillips, 461 S.E.2d 75, 92-93 (W. Va. 1995); State v. Crawford, 872 P.2d 293, 297-298 (Kan. 1994); State v. DiFrisco, 645 A.2d 734, 752 (N.J. 1994); State v. Menzies, 889 P.2d 393, 400 (Utah 1994) (and cited by State v. Wach, 24 P.3d 948, 956 (Utah 2001)), cert. denied, 513 U.S. 1115 (1995); State v. Neuendorf, 509 N.W.2d 743, 747 (Iowa 1993); Mettetal v. State, 602 So. 2d 864, 869 (Miss. 1992); State v. Middlebrooks, 840 S.W.2d 317, 329 (Tenn. 1992); State v. Ramos, 808 P.2d 1313, 1315 (Idaho 1991); People v. Gleash, 568 N.E.2d 348, 353-354 (Ill. Ct. App. 1991); Dawson v. State, 581 A.2d 1078, 1093-1094 (Del. 1990); State v. Tyler, 553 N.E.2d 576, 586 (Ohio), cert. denied, 498 U.S. 951 (1990); State v. Pelletier, 552 A.2d 805, 810 (Conn. 1989); State v. Graham, 780 P.2d 1103, 1108 n.3 (Haw. 1989).[5]

The federal circuit courts of appeal similarly have followed this Court's decisions in Ross and Martinez-Salazar. See, e.g., Watley v. Williams, 218 F.3d 1156, 1160 (10th Cir. 2000), cert. denied, 531 U.S. 1089 (2001); Gilbert v. Moore, 134 F.3d 642, 655 (4th Cir.) (en banc), cert. denied, 525 U.S. 840 (1998); Robinson v. Jabe, 1992 U.S. App. LEXIS 2121 *13-14 (6th Cir. 1992) (unpublished).

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[5] In addition, the erroneous exclusion of qualified veniremen upon the *government's* request to strike for cause has also been the subject of analysis under Ross. See, e.g., Jones v. Dretke, 375 F.3d 352, 355-357 (5th Cir. 2004) (citing United States v. Prati, 861 F.2d 82, 87 (5th Cir. 1988)), cert. denied, 125 S.Ct. 878 (2005); Ex parte Dailey, 828 So. 2d 340, 343 (Ala. 2001). These cases have involved challenges for cause that did not rely upon Witherspoon v. Illinois, 391 U.S. 510 (1968).

Also following this Court's lead are at least two state supreme courts expressly abandoning the automatic reversal rule adhered to in Busby. Citing Ross and subsequent decisions in accord, the Supreme Court of Iowa chose to follow what it described as "the pattern established in this very substantial number of jurisdictions." Neuendorf, 509 N.W.2d at 746-747. Within the last seven months, the Supreme Court of Wyoming relied upon case law discussing Martinez-Salazar in adopting the harmless error rule requiring a showing that the seated jury was not impartial. Klahn, 96 P.3d at 481-484 (quoting State v. Hickman, 68 P.3d 418 (Ariz. 2003)).

On the other hand, alike the majority's holding in Busby, there remain jurisdictions adhering to the rule that the so-called "loss" of a peremptory challenge upon an erroneous denial of a strike for cause constitutes a denial of the constitutional right to an impartial jury and requires automatic reversal. The majority relied upon these decisions, notwithstanding the fact that they applied or relied upon cases applying pre-Ross law. See People v. Crittenden, 885 P.2d 887, 906-907 (Cal. 1994) (compare Yeoman, cited supra, at 9), cert. denied, 516 U.S. 849 (1995); Commonwealth v. Auguste, 605 N.E.2d 819, 823-824 (Mass. 1992) (quoting Commonwealth v. Wood, 451 N.E.2d 714, 721 (1983)); Fuson v. State, 735 P.2d 1138, 1139-1140 (N.M. 1987); Commonwealth v. Impellizzeri, 661 A.2d 422, 426-427 (Pa. 1995); State v. Santelli, 159 Vt. 442, 445-446, 621 A.2d 222 (Vt. 1992); David v. Commonwealth, 493 S.E.2d 379, 381 (Va. 1997).[6]

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[6] The majority further relied upon numerous other cases, App. A-25-26, that do not address the Sixth Amendment right to an impartial jury as presented here. Instead, they turned upon procedural due process or state statutory and/or state constitutional provisions. See People v. Lefebre, 5 P.3d 295, 304 (Colo. 2000) (due process); State v. Esposito, 613 A.2d 242, 248, 249-250 (Conn. 1992) (state constitutional and statutory right to peremptory challenges); State v. Kauhi, 948 P.2d 1036, 1041 (Haw. 1997) (due process, citing Ross's due process analysis; compare Graham, cited supra, at 10); Thomas v. Commonwealth, 864 S.W.2d 252, 258-259 (Ky. 1993) (due process), cert. denied, 510 U.S. 1177 (1994); State v. Cross, 658 So. 2d 683,

Yet in facts paralleling those in Busby -- where a defendant's request for a strike for cause was erroneously denied, all peremptory challenges were used, he identified another venireman that he would remove but for the denial of a requested additional peremptory -- the Sixth Circuit reached the opposite result of the Florida Supreme Court. Robinson, 1992 U.S. App. LEXIS 2121 *13-14. And the Alaska Court of Appeals, which assumed that the defendant would have used an extra peremptory to remove a specific venireman that ended up on the jury, rejected a presumption of prejudice or that it was sufficient that the defendant did not have a jury composed of certain individuals to establish reversible error. Minch, 934 P.2d at 769-770.

As the foregoing demonstrates, there exists a vast split of authority between the states, including continued reliance upon pre-Ross decisions -- presenting a significant basis for guidance from this Court. Indeed, state law accords criminal defendants the right to exercise peremptory challenges, which of course is done in every jury trial. Thus, the potential for error in the trial court's exercise of discretion in evaluating a defendant's for cause strike and the resultant effect on his peremptory challenges rights is evident,

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686 (La. 1995)(state constitutional and statutory right to peremptory challenges); State v. Freshment, 43 P.3d 968, 975 (Mont. 2002) (state law right, citing State v. Good, 43 P.3d 948, 956 (Mont. 2002)); People v. Cahill, 809 N.E.2d 561, 577-578 (N.Y. 2003) (Witherspoon error; remedy citing state statute); State v. Conner, 440 S.E.2d 826, 835 (N.C. 1994) (state law basis, which precluded additional peremptory challenges, and peremptories not exhausted); Tyler, 553 N.E.2d at 586-587 (reviewing for error under state law and, assuming error, no prejudice found where peremptory challenge removed venireman); Johnson v. State, 43 S.W.3d 1, 2, 6 (Tex. Crim. App. 2001) (limited to interpretation and applicability of state harmless error appellate procedure rule); Phillips, 461 S.E.2d at 92-93 (distinguishing between distinct grounds raised: constitutional right to an impartial jury and statutory right to peremptory challenges). And one decision cited by the majority, also pre-Ross, did not identify the basis for the claim involving the use of the peremptory nor address the issue of prejudice. State v. Albano, 111 A. 753 (Me. 1920).

particularly given the expansive litigation of such matters. The petition for writ of certiorari should be granted.

*B. Per se reversible error from the alleged error in not according a defendant an additional peremptory challenge where the trial court erroneously denied the defense motion for a strike for cause violates this Court's jurisprudence that constitutional errors may nonetheless be harmless.*

Without having to demonstrate actual prejudice, the Florida Supreme Court held that a criminal defendant is entitled to a new trial if the trial court erred in not removing the venireman subject to a strike for cause where defendant then removed that person with a peremptory challenge, having used the remaining challenges afforded under Fla. Stat. § 913.08, and being denied an additional peremptory to remove an identified venireman that sits on the jury. This windfall to the defendant derives from an elevation of form over substance, and is not compelled by the federal constitution and is unfounded under state law.[7]

Under the Florida Supreme Court's opinion, the fairness of a defendant's criminal proceedings literally is irrelevant for the sake of a statutory right to a number of peremptory challenges intended in themselves to guarantee the fairness of those proceedings. Most states have rejected this very proposition. See App. A-35 n.23 (Bell, J., dissenting) (citing cases); see also supra,

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[7] As the dissent discussed in Busby, Fla. Stat. § 924.33 expressly "require[s] that a defendant show actual harm in order for a conviction to be reversed." App. A-37-38. That statute, pertaining to appellate review, mirrors the federal harmless error rules. Compare § 924.33 (no judgment shall be reversed unless the substantial rights of the appellant are affected) with Fed.R. Civ.P. 61 ("The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."); Fed.R. Crim.P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

at 9-11. In addition to "constitutionalizing" the statutory right to peremptory challenges, the state court's majority opinion simply cannot be reconciled with this Court's harmless error jurisprudence.

In the context of constitutional errors, the Court has recognized that "most" -- those not infringing upon the fairness of the trial -- "can be harmless." Neder v. United States, 527 U.S. 1, 8 (1999) (internal citation and quotation marks omitted). A number of examples abound where such errors were not subject to automatic reversal. See, e.g., Id. at 10, 15 (jury instruction omitting element of materiality in respect to federal tax fraud charges); Jones v. United States, 527 U.S. 373, 402 (1999) (assuming jury consideration of unconstitutional non-statutory aggravating circumstances); Arizona v. Fulminante, 499 U.S. 279, 309-310 (1991) (unconstitutional admission of coerced confession at guilt stage); Clemons v. Mississippi, 494 U.S. 738, 752-753 (1990) (unconstitutionally broad jury instructions at sentencing stage); Satterwhite v. Texas, 486 U.S. 249, 258 (1988) (unconstitutional admission of evidence at sentencing stage). Indeed, "'[i]f the defendant had counsel and was tried *by an impartial adjudicator*, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis.'" Neder, 527 U.S. at 8 (emphasis added; quoting Rose v. Clark, 478 U.S. 570, 579 (1986)).

Any error here in denying the strike for cause did not implicate the fairness of the trial and thus falls within the ambit of those cases cited above subject to harmless error analysis.[8] Given the absence of a showing that the jury here was biased, the Florida Supreme Court's decision simply elevates the status of a trial court error by creating a presumption of the deprivation of a substantial right -- based upon a misapprehension of the constitutional right to

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[8] The Supreme Court of Florida made no such analysis. And incidentally, even as a matter of state law the majority failed to apply the harmless error analysis required under § 924.33, Fla. Stat. See App. A-37-38 (Bell, J., dissenting in part).

an impartial jury. Compare Batson v. Kentucky, 476 U.S. 79, 100 (1986) (reversal required upon determination of purposeful discrimination in jury selection process); accord United States v. Serino, 163 F.3d 91, 93 (1st Cir. 1998) (rejecting harmless error argument); United States v. Annigoni, 96 F.3d 1132, 1143-1147 (9th Cir. 1996) (same); cf. Vasquez v. Hillery, 474 U.S. 254, 262-263 (1986) (harmless error analysis inapplicable to discrimination in grand jury selection process).

Because the Florida Supreme Court's decision cannot be reconciled with this Court's harmless error jurisprudence, the petition should be granted.

## II.

## THE FLORIDA SUPREME COURT'S HOLDING THAT A DEFENDANT HAS AN UNQUALIFIED RIGHT TO PEREMPTORY CHALLENGES TO EFFECTUATE HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY VIOLATES BATSON v. KENTUCKY, 476 U.S. 79 (1986) AND ITS PROGENY BY PERMITTING THE DISCRIMINATORY USE OF PEREMPTORY CHALLENGES.

In holding that Busby's constitutional right to an impartial jury was automatically denied -- based upon the state trial court's error in not removing a venireman for cause, respondent's use of a peremptory challenge to remove that individual, and the denial of respondent's request for an additional peremptory upon his identification of a venireman he would have removed but for the "compelled" use of that peremptory -- the Florida Supreme Court's interpretation of the Sixth Amendment violates Batson v. Kentucky, 476 U.S. 79 (1986) and its progeny. Thus, in addition to constitutionalizing the import of peremptory challenges, operation of the state court's application of state law allows a defendant to utilize a peremptory challenge on a discriminatory basis -- otherwise impermissible under the Fourteenth Amendment

-- to build in reversible error and obtain a new trial in the event of a conviction.

In Batson, this Court observed that it had previously held that "a denial of equal protection [occurs] where the procedures implementing a neutral statute operated to exclude persons from the venire on racial grounds, and has made clear that the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors." Id., 476 U.S. at 88 (internal footnotes omitted). See also Powers v. Ohio, 499 U.S. 400, 409 (1991) ("An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.").

The Court reiterated the above principles in J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994), stating that

> [s]ince Batson, we have reaffirmed repeatedly our commitment to jury selection procedures that are fair and nondiscriminatory. We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.

Id. at 128. The Court thereupon held that the use of a peremptory challenge to remove a venireperson based upon gender violates the Equal Protection Clause, thus answering in the negative the question "whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury." Id. at 137 & n.6.

Further, because the right to the exercise of peremptory challenges is a matter of state statutory law, the use of peremptory challenges "is attributable to state action" on the trial level. Georgia v. McCollum, 505 U.S. 42, 54-55 & n.10 (1992); see also

Edmonson v. Leesville Concrete Co., 500 U.S. 614, 626 (1991) (civil litigant's use of peremptory challenges as authorized by a statutory provision constitutes state action). Thus just as the State is prohibited from exercising its peremptory challenges in a discriminatory fashion, so too is the criminal defendant. McCollum, 505 U.S. at 59.

Accordingly, it is beyond dispute that the per se reversible error rule accorded by the Florida Supreme Court similarly constitutes state action violative of the federal constitution, to the extent that it permits a requested peremptory challenge based upon a discriminatory purpose that would have been exercised but for lack of availability. The particular harm in the state court's decision rests with its automatic reversal rule that awards a defendant notwithstanding the undetectable potential unconstitutionality of his projected use of the requested peremptory. It is not the state-provided right to peremptory challenges itself that offends the Equal Protection Clause, see J.E.B., 511 U.S. at 143 (the conclusion that gender-based peremptory challenges are impermissible does not "imply the elimination of all peremptory challenges."). Instead, in this instance it is the Florida Supreme Court's interpretation of state law effectively authorizing such discriminatory challenges.

To clarify whether an automatic reversal rule in conjunction with the denial of additional peremptory challenges is constitutional or contrary to Batson and its progeny, the petition for writ of certiorari should be granted.

## CONCLUSION

WHEREFORE, Petitioner State of Florida prays the Court for its order issuing a writ of certiorari and reversing the judgment of the court below.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General of Florida

CASSANDRA K. DOLGIN
Assistant Attorney General
*Counsel of Record*

The Capitol
Tallahassee, FL 32399-1050
(850) 414-3579
(850) 487-0997 (fax)

*Attorneys for Petitioner*